

UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE

UNITED STATES OF AMERICA,	)	
	)	
v.	)	Crim. No. 04-26-B-W
	)	
ERROL E. LIBBY, JR.,	)	
	)	
Defendant	)	

**RECOMMENDED DECISION ON DEFENDANT'S  
AMENDED MOTION TO SUPPRESS (DOCKET NO. 17)**

Errol E. Libby, Jr. is charged in a one count indictment with knowingly possessing firearms after having been convicted of a state misdemeanor crime of domestic violence. This matter was before the court on Libby's amended motion to suppress. (Docket No. 17.) Libby seeks to suppress both physical evidence and statements made to law enforcement personnel, raising issues under the Fourth, Fifth and Sixth Amendments to the United States Constitution. Based upon the evidence presented at the hearing and the affidavits and exhibits submitted in conjunction with the amended motion, I now recommend that the court adopt these proposed findings of fact and **DENY** the motion to suppress, provided, however, that the court should order that the statements the Government concedes were obtained in violation of Miranda v. Arizona, 384 U.S. 436 (1966) cannot be used as part of the Government's case in chief.

***Proposed Findings of Fact***

From approximately October 9, 2003, through February 8, 2004, Stefani Page and Errol Libby, Jr. lived together in Libby's house in Wilton, Maine, sharing an upstairs bedroom and domestic responsibilities, including the care of three, and sometimes four,

minor children residing in the household. (Page Aff. ¶¶ 1 – 4, Docket No. 24.)<sup>1</sup> Page had equal access to the sole key to the residence. (Id. ¶ 5). Approximately two weeks prior to Libby's arrest on February 8, Page decided to leave the household. She proceeded to pack her belongings, but Libby induced her to stay. The night of February 8 Libby and Page had a fight and Page determined to leave for good, but, fearing for her safety and the safety of her baby, she did not have time to take her belongings with her. (Id. ¶ 6.) Retreating to a neighbor's house, Page called the police and they arrived at the scene to interview her. When asked by the police she informed them that Libby had guns in the house in an upstairs closet. She gave the police consent to go into the house and get the guns. (Id. ¶ 7.)<sup>2</sup>

Kevin McCutcheon was the Wilton police officer who responded to the domestic disturbance call. (McCutcheon Aff. ¶ 2, Docket No. 25.) Page described the domestic disturbance to McCutcheon and showed an apparent injury she had suffered to the officer. According to McCutcheon, Page appeared "visibly scared and had described Mr. Libby as violent." (Id. ¶ 5.) McCutcheon determined in his mind that there was a safety risk and he called for backup before he went to Libby's residence. Deputy Rackliffe of the Franklin County Sheriff's Department arrived at the scene and both officers went together to Libby's house. Libby let them into the residence, denied any wrongdoing vis-à-vis Page, and denied that there were guns in the upstairs closet. (Id. ¶ 6.) The officers made observations consistent with evidence that a scuffle had occurred inside the Libby

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<sup>1</sup> Further details surrounding the nature of those domestic responsibilities and living arrangements, as set forth in the affidavit and made part of these findings, are set forth below in my discussion of Page's authority to consent to the search.

<sup>2</sup> After Libby had been removed from the scene, Page and her father went to the premises to retrieve the majority of her belongings. (Id. ¶ 8.)

residence consistent with Page's version of events. They placed Libby under arrest. (Id. ¶ 7.)

Once Libby was placed in custody, and without benefit of any Miranda warnings, McCutcheon questioned Libby about his ownership of the guns. Libby admitted the guns were his and apparently conceded that he knew he was not allowed to possess firearms. Libby was on state probation at the time and McCutcheon had contact with Libby's state probation officer and knew that the probation officer wanted a "hold" placed on Libby because of the marijuana and guns that had been found in the residence. McCutcheon prepared a police report describing these events.

The following morning, February 9, 2004, Libby went to the Maine District Court for arraignment on the state charges of domestic assault and criminal threatening (and perhaps in connection with the state probation violation). Libby requested a court appointed attorney at his arraignment. Following the arraignment he was remanded to the Franklin County Jail.

On February 9, 2004, Michelle St. Clair, a Franklin County deputy sheriff who "specializes" in federal firearms offenses, went to the bail room of the county jail to speak with Libby. Before going to the jail, St. Clair had received information about Libby from the Franklin County District Attorney's office and possibly from a conversation with Deputy Rackliffe. Apparently she had rudimentary knowledge that firearms had been discovered in Libby's residence the preceding evening during a search. She also had police reports from 2002 relating to the underlying domestic assault conviction that was the basis of the federal firearms charge. St. Clair had not been present at the arraignment, but Libby told her that he had requested a court appointed

lawyer when he was arraigned. St. Clair fully advised Libby of his Miranda rights and Libby indicated that he wished to answer questions, whereupon St. Clair questioned him about the firearms discovered in his residence.

Libby has now moved to suppress the firearms and the statements made on February 8 and 9. The Government concedes that the statements made to Deputy McCutcheon after Libby was placed under arrest and while locating firearms in the residence should be suppressed as the product of an unwarned custodial interrogation. Thus the statements at issue are limited to the initial discussion between Libby and McCutcheon when McCutcheon first came to the house and the subsequent interview conducted by St. Clair.

### ***Discussion***

#### **1. The Fourth Amendment Issue**

The Government justifies this search as a valid third party consent search of a residence. Libby, on the other hand, argues that two factors vitiate the validity of any consent ostensibly given by Stefani Page. First, he argues that Page had severed the joint tenancy of the residence by voluntarily leaving the home the evening of the search. Second, Libby maintains that the First Circuit Court of Appeals has never recognized the validity of third party consent when the third party was not present at the scene and the occupant of the residence did not himself consent to the search. The evidence is undisputed that Page affirmatively consented to the search and in fact told the officers where they would find the firearms. In these circumstances, under existing First Circuit precedent, I am satisfied that Page's consent was valid.

The undisputed facts in this case demonstrate that Stefani Page was a joint resident in Libby's house and had apparent authority to consent to the search. See Illinois v. Rodriguez, 497 U.S. 177, 186-87 (1990) (concluding that a law enforcement officer may rely on a person's "apparent authority" to consent to search if the reliance is in good faith and reasonably based on all the facts available at the time of the search). The officers knew Page cared for Libby's children and attended to various household tasks during the period of cohabitation. They shared a bedroom and she had access to all parts of the house. Although she had announced her intent to leave the domicile, her property remained at the house when she consented to the search. She certainly had not "moved out" of the residence, as that term is commonly understood. She fled the residence in fear for her personal safety and she clearly intended to return to reclaim her personal belongings.

In United States v. Trzaska the court concluded that consent obtained from defendant's estranged wife was valid, even though she and her children had moved out of the apartment two weeks before the search. 859 F.2d 1118, 1120 (2d Cir. 1988). In Trzaska, the estranged wife called police from a relative's house and informed them that defendant, who was on probation, had numerous firearms in the apartment. She then consented to the search of the apartment and accompanied police while they performed the search. The court ruled that where the record supported a finding of common authority and joint use of the property, the wife's consent was valid despite her physical location. Id.; accord United States v. Crouthers, 669 F.2d 635, 642-43 (10th Cir. 1982) (concluding that consent of defendant's wife was valid even though she had moved out of apartment two weeks earlier and was living with parents, because she had not abandoned

marriage or apartment completely and still retained key); United States v. Long, 524 F.2d 660, 661 (9th Cir.1975) (observing that wife who was joint owner of house had right to give consent even though husband had changed locks, where wife left house out of fear of husband and where she collected personal belongings during the search); United States v. Lawless, 465 F.2d 422 (4th Cir. 1972)(determining that wife's consent to search was valid even though she abandoned premises on night of search where at time of consent, wife was clearly entitled to be present in home and until night in question wife had joint rights in residence).

As the attached affidavit of Stefani Page makes clear, she possessed common authority over and joint access to Libby's residence when she gave police consent to search for firearms. Page had lived with Libby for a matter of months as an intimate partner. Her infant son and two of Libby's young children, ages six and four, lived with them. Libby's third child, age two, lived with them on weekends. Because Libby worked during the day, Page assumed responsibility for the care of all of the children, the cooking and laundry. She paid house-related bills and ordered oil for the house furnace. She and Libby shared a joint bank account, from which household expenses were drawn. She had unlimited access to the residence and had equal access to the only key. She stored her possessions in the house, as well as items belonging to her infant son. She was free to invite friends in. Approximately two weeks before the search of the residence, Libby and Page had an argument and she decided to leave. She packed some of her belongings and informed Libby of her decision. He convinced her to stay. On the night of the search, she fled from the residence to a neighbor's house because of Libby's violent behavior. She did not have time to take her possessions with her. Even though not

married to Libby, on these facts, Page had common authority over and joint access to his residence when she consented to the search. Her consent was therefore valid.

Libby alleges that Page had malicious motives when she informed police about the guns and consented to the search of the residence, and that her ill will rendered her consent invalid. This argument fails. As Matlock v. United States, 415 U.S. 164, 171 (1974) and its progeny make clear, Page was not waiving Libby's Fourth Amendment right by consenting to the search. By sharing his home with Page, Libby assumed the risk that she might permit police to enter and inspect the areas of the home over which she had common authority. Where Page had the legal right to consent to the search, her motives for doing so are irrelevant.

Libby's able counsel cites cases from state appellate courts and other circuit courts of appeal that have wrestled with and distinguished certain factual aspects, when dealing with the question of third party consent by an estranged wife or domestic partner. However, the crucial case for purposes of my analysis is United States v. Donlin, 982 F.2d 31, 33 (1st Cir. 1992), wherein the First Circuit Court of Appeals held that an estranged wife with common authority over the premises could validly consent to search even though the defendant objected to search and even though the estranged wife sought to remove her belongings from the premises in order to stay elsewhere. Libby suggests that this case does not control the outcome of his motion because Page, unlike Donlin's wife, was not actually at the house at the time of the search. But I believe this distinction is without a difference. Donlin's wife was in the hallway of the apartment with her sister because her husband was intoxicated and extremely violent. She was not actually in the apartment with the defendant, anymore than Page was in Libby's house at the time of the

search. Page had merely fled to a neighbor's house, rather than an apartment hallway, and the distinction that Libby attempts to draw fails. In my view, Donlin controls the outcome of this case once the court finds that Page had apparent authority to consent to this search.

## **2. The Statements Made to Law Enforcement**

### *(a) The February 8 statements to McCutcheon*

These February 8 statements to McCutcheon require little discussion. The Government concedes that McCutcheon solicited unwarned statements from Libby after he had been placed under arrest. Those statements cannot be used by the Government during its case in chief. Their relevance vis-à-vis the February 9 statement to St. Clair is discussed below. The initial statements by Libby, denying Page's accusations and denying any knowledge of guns, were not the product of a custodial interrogation as the officers had not yet placed Libby under arrest, he was in his own home, and the exchange appears to have been relatively brief. Those statements were not obtained in violation of Miranda.

### *(b) The February 9 statement to St. Clair*

Libby challenges the February 9 statement on both Fifth and Sixth Amendment grounds. He claims that his right to counsel had attached at his state court arraignment and that on these facts that right extended to the federal firearms investigation. His Fifth Amendment challenge is two-pronged. First, he argues that he unambiguously asserted his right to counsel when advised of his Miranda rights and that Deputy St. Clair nevertheless proceeded to question him. Second, he claims that the February 9 statement is the unconstitutional product of the unwarned February 8 statement and therefore

subject to suppression under the doctrine set forth in Missouri v. Seibert, \_\_\_ U.S. \_\_\_, 124 S.Ct. 2601 (June 28, 2004). I will address each of his arguments in turn.

The Sixth Amendment right to counsel is "offense specific." Texas v. Cobb, 532 U.S. 162, 167 (2001) (quoting McNeil v. Washington, 501 U.S. 171, 175 (1991)). "It does not attach until prosecution is commenced, that is, at or after the initiation of adversary judicial criminal proceedings – whether by way of formal charge, preliminary hearing, indictment or information, or arraignment." Id. at 167-68 (quoting McNeil, 501 U.S. at 175.) The Supreme Court in Cobb expressly rejected the notion that once the Sixth Amendment right to counsel attaches as to charged offenses, it prevents questioning as to any crime that is "factually related" to the charged offenses. Id. at 168. The right to counsel only encompasses "offenses that, even if not formally charged, would be considered the same offense under the Blockburger test." Id. at 173 (citing Blockburger v. United States, 284 U.S. 299 (1932)). Under Blockburger, "the test to be applied to determine whether there are two offenses or only one, is whether each [statutory] provision requires proof of a fact which the other does not." 284 U.S. at 304.

Applying this analysis in Cobb, the Supreme Court rejected appellant's argument that his confessions that he murdered a woman and infant in the course of a burglary should be excluded because at the time of the confession he was represented on the burglary. Because burglary and murder were not the same offense under Blockburger, the Court wrote, the Sixth Amendment right to counsel "did not bar police from interrogating [Cobb] regarding the murders, and [Cobb's] confession was therefore admissible." Cobb, 532 U.S. at 174.

In this case, by the time Libby spoke with Deputy St. Clair in the Franklin County Jail, Libby had been formally charged with the state crimes of domestic assault and criminal threatening and had appeared in court on those charges. He had requested court-appointed counsel. The Government does not dispute that his right to counsel attached as to the state charges no later than his arraignment on those charges. The subject of Deputy St. Clair's investigation and interview, however, was Libby's gun possession, as to which no charges had been filed. She was investigating whether Libby had violated federal law, specifically 18 U.S.C. § 922(g)(9), which prohibits people convicted of misdemeanor crimes of domestic violence from possessing firearms. As in Cobb, the offenses with which defendant had been charged (assault and criminal threatening) and the federal crime Deputy St. Clair was investigating (unlawful gun possession), although factually related, could not be considered the same offense under the Blockburger test. Even though the right to counsel had attached as to the state crimes, therefore, it did not extend to the federal crime and questioning was permissible.

Libby argues that even if the interview was not automatically barred under the Sixth Amendment by his earlier request for counsel in the state case, questioning should have ceased as soon as he informed Deputy St. Clair that he had requested counsel at his state arraignment. He argues that by mentioning his request for counsel at the state arraignment he invoked his right to counsel for the sake of the interview and that any further questioning should have ceased. For this reason, in Libby's view, his apparent assent to answer questions lacked validity.

The Government provides a comprehensive examination of a series of cases wherein the court has viewed a reference to counsel during the Miranda warning as

ambiguous and therefore not requiring the officer to cease speaking with the defendant. If a defendant subjected to custodial interrogation unequivocally invokes his right to counsel, all questioning must cease. Miranda, 384 U.S. at 473-74. To activate the prohibition on continued questioning, however, the request for counsel must be unambiguous. Davis v. United States, 512 U.S. 452, 458-62 (1994). Applying this analysis, the Supreme Court in Davis found that continued police questioning was permissible even after defendant stated, "Maybe I should talk to a lawyer," concluding that his statement was ambiguous. Id. at 62. The Government provides a comprehensive list of circuit precedent applying Davis that finds the defendant's particular statement to be ambiguous. See Bui v. DiPaolo, 170 F.3d 232, 238-39 (1st Cir. 1999)(defendant invoked rights, then said, "Who said I did this?"); Diaz v. Senkowski, 76 F.3d 61, 63 (2nd Cir 1996)("Do you think I need a lawyer?"); Burket v. Angelone, 208 F.3d 172, 197-98 (4th Cir. 2000)("I think I need a lawyer."); Dormire v. Wilkinson, 249 F.3d 801, 805 (8th Cir. 2001)(continued questioning appropriate where defendant asked, "Could I call my lawyer?" because statement could have been inquiry about his right to call lawyer).

Libby's comment regarding his appearance in state court and his request for a court appointed attorney at that proceeding falls within the heartland of this precedent when viewed in the context of his immediate response that he was agreeable to answering questions. He did not request that an attorney be provided to him before any questioning.

Libby's final challenge relates back to the statements elicited from him by McCutcheon the night prior to St. Clair's questioning. In Seibert the United States Supreme Court held that Miranda warnings given mid-interrogation, after the defendant gave an unwarned confession, were ineffective, and thus a confession repeated after

warnings were given was inadmissible at trial. 124 S.Ct. 2601. Libby attempts to argue that this case is applicable to his situation. It is not. In the present case the two interrogations were separated by a considerable period of time (approximately twenty hours), a change of location, and a new and different investigating officer and agency. Furthermore, there was nothing deliberate about the officers' conduct in that there is no evidence to suggest that McCutcheon and St. Clair had anything approaching an organized interrogation technique. Based on these circumstances, there is no reason that the subsequent waiver given to St. Clair should be viewed as invalid or tainted in anyway by McCutcheon's conduct.

### **Conclusion**

In view of the foregoing, I now recommend that the court **DENY** the amended motion to suppress (Docket No. 17), provided that the Government is prohibited from using the statements made to McCutcheon following the arrest as part of its case in chief.

### **NOTICE**

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, and request for oral argument before the district judge, if any is sought, within ten (10) days of being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

Dated: July 30, 2004

/s/Margaret J. Kravchuk  
U.S. Magistrate Judge

**Case title:** USA v. LIBBY  
**Other court case number(s):** None  
**Magistrate judge case number(s):** None

**Date Filed:** 03/09/04

**Assigned to:** JUDGE JOHN A.  
WOODCOCK JR.  
**Referred to:**

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**Pending Counts**

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18:922G.F - POSSESSION OF  
FIREARM AFTER  
MISDEMEANOR CRIME OF  
DOMESTIC VIOLENCE -  
18:922(g)(9)  
(1)

**Disposition**

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**Highest Offense Level (Opening)**

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Felony

**Terminated Counts**  
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None

**Disposition**  
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**Highest Offense Level  
(Terminated)**  
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None

**Complaints**  
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None

**Disposition**  
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**Plaintiff**  
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